

Hearing Date: June 9, 2009 at 10:00 a.m.
Objection Deadline: June 2, 2009

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

IN RE: : **Case No. 08-35653-KRH**
CIRCUIT CITY STORES, INC., et al., : **Chapter 11 (Jointly Administered)**
Debtors. :

MOTION OF LANDLORDS, THF CHESTERFIELD TWO DEVELOPMENT, L.L.C., THF CLARKSBURG DEVELOPMENT ONE, LIMITED LIABILITY COMPANY, THF HARRISONBURG CROSSING, L.L.C., THF ONC DEVELOPMENT, L.L.C. AND THF ST. CLAIRSVILLE DEVELOPMENT, L.P., FOR ORDER ALLOWING AND COMPELLING PAYMENT OF ADMINISTRATIVE EXPENSE CLAIM UNDER 11 U.S.C. § 503(B) AND POST-PETITION LEASE OBLIGATION UNDER 11 U.S.C. § 365(d)(3)

Landlords, THF Chesterfield Two Development, L.L.C., THF Clarksburg Development One, Limited Liability Company, THF Harrisonburg Crossing, L.L.C., THF ONC Development, L.L.C. and THF St. Clairsville Development, L.P. (each a “Landlord” and collectively, “Landlords”), by and through the undersigned counsel, move the court for entry of an order pursuant to 11 U.S.C. §§ 365(d)(3) and 503(b) of the Bankruptcy Code, allowing and compelling payment of administrative expense claims in the amounts set forth below to satisfy post-petition

Stephan W. Milo (VSB #42156)
Wharton Aldhizer and Weaver, PLC
125 S. Augusta Street
Suite 2000
Staunton, VA 24401
Phone: 540.213.7440
Fax: 540.213.0390
Email: smilo@wawlaw.com

Carl N. Kunz, III (DE Bar No. 3201)
Douglas N. Candeub (DE Bar No. 4211)
Morris James LLP
500 Delaware Avenue, Suite 1500
P.O. Box 2306
Wilmington, Delaware 19899-2306
Telephone: 302.888.6800
Facsimile: 302.571.1750
Email: ckunz@morrisjames.com
dcandeub@morrisjames.com

Co-Counsel for THF Chesterfield Two Development, L.L.C., THF Clarksburg Development One, Limited Liability Company, THF Harrisonburg Crossing, L.L.C., THF ONC Development, L.L.C. and THF St. Clairsville Development, L.P.
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obligations under an expired lease of nonresidential real property, and to compensate Landlord for post-petition use of the premises which provided a direct and substantial benefit to the Debtors' estate.¹

BACKGROUND

1. On November 10, 2008 (the "Petition Date"), Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code.
2. Landlords and Debtors were parties to the leases of non-residential real property (each a "Lease" and collectively, the "Leases") set forth in the following chart, for various retail premises situated in the shopping centers referenced below (the "Premises").

<u>Landlord</u>	<u>Shopping Center</u>	<u>Location</u>	<u>Store No.</u>	<u>Lease Rejection Date</u>
THF ONC Development, L.L.C.	The Shops @ Trace Fork	Charleston, WV	762	March 10, 2009
THF Clarksburg Development One, Limited Liability Company	Newpointe Plaza	Clarksburg, WV	3742	March 12, 2009
THF St. Clairsville Development, L.P.	Ohio Valley Plaza	St. Clairsville, OH	3750	February 23, 2009
THF Chesterfield Two Development, L.L.C.	Chesterfield Commons East	Chesterfield, MO	532	March 11, 2009
THF Harrisonburg Crossing, L.L.C.	Harrisonburg Crossing	Harrisonburg, VA	1600	March 11, 2009

3. Each Lease has been rejected by the Debtors post-petition, on the dates listed in the above chart.
4. The Leases provide for the payment of base rent by the first day of each month. The Leases at Chesterfield Commons East, the Shops @ Trace Fork, and Harrisonburg Crossing also

¹ Landlords seek allowance of their administrative expense claims herein, and payment consistent with this Court's Memorandum Opinion entered February 12, 2009 at Docket No. 2107 and other post-petition administrative claims.

provide for payment of a common area maintenance (CAM) charge by the first day of each month, while the Leases for Newpointe Plaza and Ohio Valley Plaza provide for payment of CAM annually, at the beginning of each lease year. All the Leases further provide for payment of real estate taxes by the Tenant (base rent, CAM, and taxes are collectively "Rent")

5. The Debtors have failed to make any payments for the November, 2008 Rent and other charges.

6. The monthly Rent and CAM (either monthly or annual), and real estate taxes for 2008, payable as additional rent under the Leases, all pro-rated for the period from November 10 to November 30, 2008, are as follows:

<u>Landlord</u>	<u>Shopping Center</u>	<u>Rent, CAM and Taxes</u>			<u>Prorated, 11/10 to 11/30 (21 days)</u>
THF ONC Development, LLC	The Shops @ Trace Fork	Rent - Monthly CAM- Annual Taxes -	\$35,684.85 \$ 2,133.52 \$35,039.98	\$24,979.40 \$ 1,493.46 <u>\$ 2,016.00</u>	
			Total:	\$28,488.86	
THF Clarksburg /Development One, LLC	Newpointe Plaza	Rent - Annual CAM - Annual Taxes -	\$ 19,055.00 \$ 2,500.00 \$22,516.64	\$13,338.50 \$ 143.84 <u>\$ 1,295.48</u>	
			Total:	\$14,777.82	
THF St. Clairsville Development, L.P.	Ohio Valley Plaza	Rent - Annual CAM - Annual Taxes -	\$ 19,904.50 \$ 2,500.00 \$21,273.22	\$13,933.15 \$ 143.84 <u>\$1,223.94</u>	
			Total:	\$15,300.93	
THF Chesterfield Two Development, LLC	Chesterfield Commons East	Rent - Monthly CAM- Annual Taxes -	\$ 38,645.83 \$ 4,113.02 \$98,995.22	\$27,052.08 \$ 2,879.11 <u>\$ 5,695.62</u>	
			Total:	\$35,626.81	
THF Harrisonburg Crossing, LLC	Harrisonburg Crossing	Rent - Monthly CAM- Annual Taxes -	\$ 37,572.12 \$ 2,160.00 \$ 15,265.71	\$26,300.48 \$ 1,512.00 <u>\$ 878.30</u>	
			Total:	\$28,690.78	

The amounts shown in the above chart are referred to as the "Stub Rent".

7. The Landlords assert their claims pursuant to 11 U.S.C. § 503(b)(1) for the Debtors' post-petition use and occupancy of the Premises from November 10, 2008 through November 30, 2008 in the pro-rated amounts listed above in the right column, since these amounts represent the actual, necessary costs and expenses of preserving the estate during such time.

8. Despite enjoying continuous possession of the Premises from the Petition Date through each Rejection Date, the Debtors have not paid to the Landlords the post-Petition Date portion of the rent due under each Lease for the month of November 2008. Accordingly, each Landlord is entitled to an allowed administrative claim for the post-Petition Date portion of the November 2008 rent, in the amounts set forth above.

9. In addition, there are several post-petition and post-Stub Rent month, pre-Rejection Date charges which represent a pro-rated portion of the Rent obligations for the period the Debtors occupied the Premises, but which have not paid by the Debtors, in the following amounts:

<u>Landlord</u>	<u>Shopping Center</u>	<u>Charges</u>	
THF ONC Development, L.L.C. (The Shops @ Trace Fork)	The Shops @ Trace Fork	R. E. Taxes, 12/1/08 - 3/10/09 ² <u>Less: Dec '08 portion paid</u> Balance owed:	\$9,599.99 <u>(\$2,951.71)</u> \$6,648.28
THF Clarksburg Development One, Limited Liability Company (Newpointe Plaza)	Newpointe Plaza	R. E. Taxes 12/1/08 - 3/12/09 ³ Pro-rated Annual CAM ⁴ Balance owed:	\$6,292.32 <u>\$ 273.97</u> \$6,566.29

² This figure is estimated based on the total 2008 real estate tax bill of \$35,039.98 and pro-rated by dividing by 365 days to determine the allocable portion per day, and multiplying that number by 100 days, representing the number of days from December 1, 2008 to the Rejection Date.

³ This figure is estimated based on the 2008 real estate tax bill of \$22,516.64, divided by 365 days, then multiplied by 102 days, representing the number of days from December 1, 2008 to the Rejection Date.

⁴ The annual CAM fee of \$2500.00 is due on 1/31 of each year for the preceding lease year. The amount shown here is pro-rated for the period of 2/1/09-3/12/09.

THF St. Clairsville Development, L.P. (Ohio Valley Plaza)	Ohio Valley Plaza	R. E. Taxes 12/1/08 - 2/23/09 ⁵	\$4,954.04
		Pro-rated Annual CAM ⁶	\$ 157.53
		Pro-rated Rent, 2/1 to 2/23/09	\$16,350.25
		<i>Less:</i> portion of Feb. '09 rent paid ⁷	<u>(\$ 9,952.25)</u>
		Balance owed:	\$ 11,509.57
THF Chesterfield Two Development, L.L.C. (Chesterfield Commons East)	Chesterfield Commons East	R. E. Taxes 12/1/08 - 3/11/09 ⁸	\$ 27,393.28
		<i>Less:</i> Dec '08 portion paid	<u>(\$8,384.87)</u>
		Balance owed:	\$19,008.41
THF Harrisonburg Crossing, L.L.C. (Harrisonburg Crossing)	Harrisonburg Crossing	R. E. Taxes 12/1/08 - 3/11/09 ⁹	\$4,224.21
		<i>Less:</i> Dec '08 portion paid	<u>(\$1,293.00)</u>
		Balance owed:	\$2,931.21

(the "Post-Petition Charges").

10. The charges arising under the Leases as set forth immediately above are the Debtors' obligation and therefore, the Debtors must promptly and fully comply with such obligations pursuant to 11 U.S.C. § 365(d)(3) and pay administrative rent in the amounts set forth in the far right column of the table immediately above.

ARGUMENT

11. Pursuant to 11 U.S.C. § 365(d)(3), Debtors are required to fully comply with all terms of any unexpired lease of nonresidential real property from the entry of the order for relief until such lease is assumed or rejected, notwithstanding section 503(b)(1) of the Bankruptcy Code.

⁵ This figure is estimated based on the 2008 real estate tax bill of \$21,273.22, pro-rating that figure by dividing by 365 days, then multiplying by 85 days, representing the number of days from December 1, 2008 to the Rejection Date.

⁶ The annual CAM fee of \$2500.00 is due on 1/31 of each year for the preceding lease year. The amount shown is pro-rated for the period of 2/1/09-2/23/09.

⁷ The portion of Feb. 2009 rent for St. Clairsville that remains unpaid is \$6,397.88.

⁸ This figure is estimated based on the 2008 real estate tax bill of \$98,995.22, divided by 365 days and multiplied by 101 days.

⁹ The figure shown is pro-rated from the 2008 total real estate tax attributable to the Debtor of \$15,265.71, divided by 365 days, and multiplied by 101 days.

12. Contrary to this requirement, however, the Debtors have failed to pay the Landlords for certain of their post-petition Chapter 11 obligations, leaving an arrearage for unpaid rent and other charges in the amounts specified above.

13. The purpose of Section 365(d)(3) is “to relieve the burden placed on nonresidential real property lessors (or ‘landlords’) during the period between a tenant’s bankruptcy petition and assumption or rejection of a lease.” In re Loenig Sporting Goods, Inc., 203 F.3d 986, 989 (6th Cir. 2000).

14. The Debtors have continued their business operations at the Premises after commencement of this bankruptcy proceeding. By doing so, the Debtors were obligated to remain current on their obligations under the Leases until the Leases were rejected by the Estate. Nonetheless, the Debtors have failed to comply with the specific requirements of section 365(d)(3).

15. Additionally, each Landlord is entitled to an administrative expense claim for the Stub Rent and the Post-Petition Charges pursuant to 11 U.S.C. § 503(b), which states:

After notice and a hearing, there shall be allowed administrative expenses . . . including – (1)(A) the actual, necessary costs and expense of preserving the estate, including . . . 11 U.S.C. § 503(b)(1)(A).

11 U.S.C. § 503(b). A lessor seeking administrative expense priority for a post-petition rent claim “is not required to show debtor’s continued possession of its space is a benefit to the estate” in order to prevail on its claim. In re Trak Auto Corp., 277 B.R. 655, 665 (Bankr. E.D. Va. 2002), rev’d on other grounds, 367 F.3d 237 (4th Cir. 2008).

16. Immediate payment of the Landlords’ claims is warranted at this time, since the claims for post-petition (and post-stub period) real estate lease obligations are an obligation of the Debtors’ pursuant to 11 U.S.C. § 365(d)(3) as discussed above, and the claim for post-

petition stub rent is properly due as a Section 503(b)(1) administrative claim to be paid when similarly situated stub rent claims are paid.

17. In the instant case, the Debtors benefited by having control of the Premises during the time period in which the Stub Rent accrued. Furthermore, the Debtors benefited by using the Premises during the pendency of the bankruptcy case without having to pay the appropriate rent and other charges. Accordingly, the Landlords should be allowed a Chapter 11 administrative claim to the extent of the Stub Rent and the Post-Petition Charges.

18. The Stub Rent constitutes an allowable administrative expense pursuant to § 503(b)(1). In re Goody's Family Clothing, Inc., 392 B.R. 604, 614 (Bankr. D. Del. 2008), citing Zagata Fabricators, Inc. v. Superior Air Products, 893 F.2d 624, 627 (3d Cir. 1990). “The mere fact that the Debtors are occupying the Landlords’ premises is sufficient, in and of itself, to establish that payment for that use and occupancy is an actual, necessary expense of preserving the Debtors’ estates under section 503(b)(1).” Id. When a debtor occupies and uses leased premises post-petition, the “landlord is entitled to an administrative claim in the amount of the fair market value of the premises.” Zagata, 893 F.2d at 627, See also In re ZB Company, Inc., 302 B.R. 316, 319 (Bankr. D. Del. 2003). Further, “there is a presumption that the lease rate is the fair market value unless there is evidence to the contrary.” ZB Company, 302 B.R. at 319.

19. Section 507(a)(1) of the Bankruptcy Code provides that administrative expenses under 11 U.S.C. § 503(b) have first priority.

20. Landlords respectfully ask the Court to treat this Motion as a written memorandum of points and authorities and to waive the requirement of Local Bankruptcy Rule 9013(G).

WHEREFORE, the Landlords, THF Chesterfield Two Development, LLC, THF Clarksburg/Development One, LLC, THF Harrisonburg Crossing, LLC, THF ONC

Development, LLC and THF St. Clairsville Development, L.P., respectfully requests that the Court enter an Order substantially in the form annexed hereto: (i) compelling the Debtors to pay the Landlords the following amounts for post-petition Stub Rent from November 10, 2008 through November 30, 2008 as an administrative expense claim under 11 U.S.C. § 503(b)(1):

<u>Landlord</u>	<u>Shopping Center</u>	<u>Monthly Rent & CAM</u>	<u>11/10-11/30 (21 days)</u>
THF ONC Development, LLC	The Shops @ Trace Fork	Rent - \$35,684.85 Monthly CAM- \$ 2,133.52 Annual Taxes - \$35,039.98	\$24,979.40 \$ 1,493.46 \$ 2,016.00
			Total: \$28,488.86
THF Clarksburg /Development One, LLC	Newpointe Plaza	Rent - \$ 19,055.00 Annual CAM - \$ 2,500.00 Annual Taxes - \$ 22,516.64	\$13,338.50 \$ 143.84 \$ 1,295.48
			Total: \$14,777.82
THF St. Clairsville Development, L.P.	Ohio Valley Plaza	Rent - \$ 19,904.50 Annual CAM - \$ 2,500.00 Annual Taxes - \$ 21,273.22	\$13,933.15 \$ 143.84 \$1,223.94
			Total: \$15,300.93
THF Chesterfield Two Development, LLC	Chesterfield Commons East	Rent - \$ 38,645.83 Monthly CAM- \$ 4,113.02 Annual Taxes - \$98,995.22	\$27,052.08 \$ 2,879.11 \$ 5,695.62
			Total: \$35,626.81
THF Harrisonburg Crossing, LLC	Harrisonburg Crossing	Rent - \$ 37,572.12 Monthly CAM- \$ 2,160.00 Annual Taxes - \$ 15,265.71	\$26,300.48 \$ 1,512.00 \$ 878.30
			Total: \$28,690.78

for the Debtors' use and occupancy of the Premises during such time; (ii) compelling the Debtors to immediately pay the following for outstanding post-petition and post-stub period rent and other charges:

<u>Landlord</u>	<u>Shopping Center</u>	<u>Charges</u>
THF ONC Development, L.L.C. (The Shops @ Trace Fork)	The Shops @ Trace Fork	R. E. Taxes, 12/1/08 - 3/10/09 Less: Dec '08 portion paid Balance owed:

THF Clarksburg Development One, Limited Liability Company (Newpointe Plaza)	Newpointe Plaza	R. E. Taxes 12/1/08 - 3/12/09 Pro-rated Annual CAM Balance owed:	\$6,292.32 \$ 273.97 \$6,566.29
THF St. Clairsville Development, L.P. (Ohio Valley Plaza)	Ohio Valley Plaza	R. E. Taxes 12/1/08 - 2/23/09 Pro-rated Annual CAM Pro-rated Rent, 2/1 to 2/23/09 Less: portion of Feb. '09 rent paid Balance owed:	\$4,954.04 \$ 157.53 \$16,350.25 (\$ 9,952.25) \$ 11,509.57
THF Chesterfield Two Development, L.L.C. (Chesterfield Commons East)	Chesterfield Commons East	R. E. Taxes 12/1/08 - 3/11/09 Less: Dec '08 portion paid Balance owed:	\$ 27,393.28 (\$8,384.87) \$19,008.41
THF Harrisonburg Crossing, L.L.C. (Harrisonburg Crossing)	Harrisonburg Crossing	R. E. Taxes 12/1/08 - 3/11/09 Less: Dec '08 portion paid Balance owed:	\$4,224.21 (\$1,293.00) \$2,931.21

as a claim under 11 U.S.C. § 365(d)(3); and (iii) granting the Landlords such other and further relief as this Court deems just and proper under the circumstances.

**WHARTON ALDHIZER AND WEAVER,
PLC**

/s/ Stephan W. Milo
Stephan W. Milo (VSB #42156)
125 S. Augusta Street
Suite 2000
Staunton, VA 24401
Phone: 540.213.7440
Fax: 540.213.0390
Email: smilo@wawlaw.com

MORRIS JAMES LLP

/s/ Douglas N. Candeub
Carl N. Kunz, III (DE Bar No. 3201)
Douglas N. Candeub (DE Bar No. 4211)
500 Delaware Avenue, Suite 1500
P.O. Box 2306
Wilmington, Delaware 19899-2306
Telephone: 302.888.6800
Facsimile: 302.571.1750
Email: ckunz@morrisjames.com
dcandeub@morrisjames.com

Co-Counsel for THF Chesterfield Two Development, L.L.C., THF Clarksburg Development One, Limited Liability Company, THF Harrisonburg Crossing, L.L.C., THF ONC Development, L.L.C. and THF St. Clairsville Development, L.P.

Dated: May 6, 2009

**Hearing Date: June 9, 2009 at 10:00 a.m.
Objection Deadline: June 2, 2009**

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

IN RE: : **Case No. 08-35653-KRH**
CIRCUIT CITY STORES, INC., et al., : **Chapter 11 (Jointly Administered)**
Debtors. :

**ORDER GRANTING MOTION OF LANDLORDS, THF CHESTERFIELD TWO
DEVELOPMENT, L.L.C., THF CLARKSBURG DEVELOPMENT ONE, LIMITED
LIABILITY COMPANY, THF HARRISONBURG CROSSING, L.L.C., THF ONC
DEVELOPMENT, L.L.C. AND THF ST. CLAIRSVILLE DEVELOPMENT, L.P., FOR
ORDER ALLOWING AND COMPELLING PAYMENT OF ADMINISTRATIVE
EXPENSE CLAIM UNDER 11 U.S.C. § 503(B) AND POST-PETITION LEASE
OBLIGATION UNDER 11 U.S.C. § 365(d)(3)**

Upon consideration of the Motion of Landlords, THF Chesterfield Two Development, L.L.C., THF Clarksburg Development One, Limited Liability Company, THF Harrisonburg Crossing, L.L.C., THF ONC Development, L.L.C. and THF St. Clairsville Development, L.P., for Order Allowing and Compelling Payment of Administrative Expense Claim Under 11 U.S.C. § 503(b) and Post-Petition Lease Obligations Under § 503(d)(3); and any response or objections thereto; and the Court having determined that notice of the Motion was proper and sufficient; it is hereby

ORDERED that the Motion is GRANTED as follows:

1. Each Landlord is awarded allowed administrative claims under 11 U.S.C. § 503(b)(1) for Stub Rent (the prorated, post-petition portion of November 2008 rent) in the following amounts:

THF ONC Development, L.L.C. (The Shops @ Trace Fork)	Rent	\$24,979.40
	CAM	\$ 1,493.46
	R.E. Taxes	<u>\$ 2,016.00</u>
	Total	\$28,488.86
THF Clarksburg Development One, Limited Liability Company (Newpointe Plaza)	Rent	\$13,338.50
	CAM	\$ 143.84
	R.E. Taxes	<u>\$ 1,295.48</u>
	Total	\$14,777.82
THF St. Clairsville Development, L.P. (Ohio Valley Plaza)	Rent	\$13,933.15
	CAM	\$ 143.84
	R.E. Taxes	<u>\$1,223.94</u>
	Total	\$15,300.93
THF Chesterfield Two Development, L.L.C. (Chesterfield Commons East)	Rent	\$27,052.08
	CAM	\$ 2,879.11
	R.E. Taxes	<u>\$ 5,695.62</u>
	Total	\$35,626.81
THF Harrisonburg Crossing, L.L.C. (Harrisonburg Crossing)	Rent	\$26,300.48
	CAM	\$ 1,512.00
	R.E. Taxes	<u>\$ 878.30</u>
	Total	\$28,690.78

2. Each Landlord is awarded allowed administrative claims under 11 U.S.C. § 365(d)(3)

for Post-Petition Obligations in the following amounts:

THF ONC Development, L.L.C. (The Shops @ Trace Fork)	R. E. Taxes, 12/1/08 - 3/10/09	\$9,599.99
	<i>Less: Dec '08 portion paid</i>	<u>(\$ 2,951.71)</u>
	Balance owed:	\$6,648.28
THF Clarksburg Development One, Limited Liability Company (Newpointe Plaza)	R. E. Taxes 12/1/08 - 3/12/09	\$6,292.32
	Pro-rated Annual CAM	<u>\$ 273.97</u>
	Balance owed:	\$6,566.29
THF St. Clairsville Development, L.P. (Ohio Valley Plaza)	R. E. Taxes 12/1/08 - 2/23/09	\$4, 954.04
	Pro-rated Annual CAM	\$ 157.53
	Pro-rated Rent, 2/1 to 2/23/09	\$16,350.25
	<i>Less: portion of Feb. '09 rent paid</i>	<u>(\$ 9,952.25)</u>
	Balance owed:	\$ 11,509.57
THF Chesterfield Two Development, L.L.C. (Chesterfield Commons East)	R. E. Taxes 12/1/08 - 3/11/09	\$ 27,393.28
	<i>Less: Dec '08 portion paid</i>	<u>(\$8,384.87)</u>
	Balance owed:	\$19,008.41

THF Harrisonburg Crossing, L.L.C. (Harrisonburg Crossing)	R. E. Taxes 12/1/08 - 3/11/09 <i>Less: Dec '08 portion paid</i> Balance owed:	\$4,224.21 <u>(\$1,293.00)</u> \$2,931.21
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3. The Stub Rent Claims shall be paid at the same time as all other Stub Rent claims are paid.
4. The Post-Petition Obligations shall be paid within ten (10) days of the date of this Order.

BY THE COURT:

UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion of Landlords, THF Chesterfield Two Development, L.L.C., THF Clarksburg Development One, Limited Liability Company, THF Harrisonburg Crossing, L.L.C., THF ONC Development, L.L.C. and THF St. Clairsville Development, L.P., (each a "Landlord and collectively, "Landlords") for Order Allowing and Compelling Payment of Administrative Expense Claim Under 11 U.S.C. § 503(B) and Post-Petition Lease Obligation Under 11 U.S.C. § 365(D)(3) was sent in the following manner on this 6th day of May, 2009, to those parties listed on Schedule 1, and to all creditors and parties-in-interest who are included in the Bankruptcy Court's ECF email notification systems.

Dated: May 6, 2009

/s/ Stephan W. Milo
Stephan W. Milo

SCHEDULE 1

VIA FIRST CLASS MAIL

Douglas M. Foley, Esquire
Daniel F. Blanks, Esquire
McGuireWoods LLP
9000 World Trade Center
101 W. Main Street
Norfolk, VA 23510

-and-

Dion W. Hayes, Esquire
Joseph S. Sheerin, Esquire
Sarah Becket Boehm, Esquire
McGuireWoods LLP
One James Center
901 E. Cary Street
Richmond, VA 23219

-and-

Chris Dickerson, Esquire
Skadden, Arps, Slate, Meagher & Flom, LLP
33 W. Wacker Drive
Chicago, IL 60606

[Counsel for the Debtors]

Lynn L. Tavenner, Esquire
Paula S. Beran, Esquire
Tavenner & Beran
20 N. Eighth Street, 2nd Floor
Richmond, VA 23219

-and-

Jeffrey N. Pomerantz, Esquire
Pachulski Stang Ziehl & Jones LLP
10100 Santa Monica Blvd., 11th Floor
Los Angeles, CA 90067-4100

-and-

VIA FIRST CLASS MAIL

Greg M. Galardi, Esquire
Ian S. Fredericks, Esquire
Skadden, Arps, Slate, Meagher & Flom, LLP
One Rodney Square
P.O. Box 636
Wilmington, DE 19899-0636

[Counsel for the Debtors]

Robert J. Feinstein, Esquire
Pachulski Stang Ziehl & Jones LLP
780 Third Avenue, 36th Floor
New York, NY 10017-2024

*[Counsel for the Official Committee of
Unsecured Creditors]*

Robert B. Van Arsdale, Esquire
Office of the United States Trustee
701 E. Broad Street, Suite 4304
Richmond, VA 23219